IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 229 of 1994

with

CRIMINAL APPEALS No 234 of 1994,

267/94, 268/94, 318/94

AND

CRIMINAL APPEAL NO. 406 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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CRIMINAL APPEAL NO. 229 OF 1994 :

VINUGIRI MOTIGIRI - Appellant
(original Accused No.6)

Versus

STATE OF GUJARAT - Respondent

CRIMINAL APPEAL NO. 234 OF 1994 :

KALUBHAI M. KOLI - Appellant
(original Accused No.1)
V.
STATE OF GUJARAT - Respondent

CRIMINAL APPEAL NO. 267 OF 1994 :

LALITGIRI R. BAVAJI - Appellant
(original Accused No.3)
V.
STATE OF GUJARAT - Respondent

CRIMINAL APPEAL NO. 268 OF 1994 :

BAVAJI KIRANGIRI RAMGIRI - Appellant
(Original Accused No.2)
V.
STATE OF GUJARAT - Respondent

CRIMINAL APPEAL NO. 318 OF 1994 :

BAVAJI RAMESHGIRI RAMGIRI - Appellant
(original Accused No.4)
V.
STATE OF GUJARAT - Respondent

CRIMINAL APPEAL NO. 406 OF 1994 :

BAVAJI ASHOKGIRI - Appellant
(original Accused No.5)
V.
STATE OF GUJARAT - Respondent

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Appearance:
1. Criminal Appeal No. 229 of 1994

MR MJ BUDDHBHATTI for the Appellant
MR KG SHETH, APP for the State

2. Criminal Appeal No. 234 of 1994

MR JITEN M. BUDDHBHATTI for the Appellant
MR KG SHETH, APP for the State

3. Criminal Appeal Nos.267/94, 268/94 & 318/94

MRS SHILPA J. UNWALA for the Appellants
MR KG SHETH, APP for the State

4. Criminal Appeal No. 406 of 1994

MR AJ SHASHTRI for the Appellant
MR KG SHETH, APP for the State

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CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 20/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. All these six appeals arise from the judgement and order dated 28th January 1994 of the learned Additional Sessions Judge, Gondal in Sessions Case No. 212 of 1994 convicting all the six accused persons for the offence under section 302 read with section 149 of the Indian Penal Code and sentencing them to life imprisonment and payment of fine of Rs.3,000=00 each, in default to undergo further imprisonment for a period of one year.

2. The prosecution version was that, on 15th September 1992 at about 9.30 in the morning, all the six accused persons, after having formed an unlawful assembly and in furtherance of their common object of causing death of Hareshbhai Jivkubhai, attacked him on Rajkot Dhoraji Road, near the house of Gigabhai in Navagadh. In the process, they caused him as many as 18 wounds with knives and a gupti. According to the prosecution, the accused No.4 gave him blows with gupti and all the other accused with knives. On that morning, Hareshbhai had left his house for proceeding to Gondal to attend one sessions case in which his three brothers were the accused persons. His sister Geetaben who was in the house, thereafter, proceeded for going to Monghiben, wife of Gigabhai to inquire about her health. On her way, she took alongwith her a young girl Damuben to accompany her. After they reached Gigabhai's house and while Geetaben was sitting with Monghiben and Damuben, who was about 13 years of age, was playing outside the `deli' (entrance gate), Damuben saw the six accused persons attacking Hareshbhai with knives. She, therefore, raised cries and on hearing commotion, Geetaben, Inaben who is the daughter of Monghiben and Monghiben came out of the `Deli'. Hareshbhai who was given multiple blows with these weapons entered the `Deli' at that time. According

to the prosecution, after Hareshbhai entered the `Deli', the `deli' was closed from inside by Monghiben. Hareshbhai who was injured, was uttering the names of the accused Nos.2, 3 and 4 imploring them to leave him. All the six accused then climbed over the rooms of the said house known as `Chamunda Nivas' and started pelting bricks in the `fali' of the house from the top where these bricks were lying. According to the prosecution, Hareshbhai had taken off his `zabba' and was pressing it against his bleeding wounds. He then lay on the cot inside the room of Monghiben and died. He was declared dead when he was taken to the Jetpur Government Hospital at about 10 o'clock in the morning. The prosecution version is that four eye witnesses had seen Hareshbhai being attacked by these six accused persons and these were Damuben, PW-9, exh.24, Bishubhai Dahyabhai, PW-6, exh.21, Induben Bishubhai, PW-7, exh.22 and Jivkubhai, father of Hareshbhai, PW-8, exh.23. Of these persons, Bishubhai was a tenant residing in the house of Gigabhai with his wife Induben. Jivkubhai who, according to the prosecution, returned from the Dyeing Factory due to moist climate, was walking behind his son at some distance and had seen these accused persons attacking him. According to the prosecution, Monghiben and her daughter Inaben had also seen these accused persons having climbed over their house after Hareshbhai entered the `Deli' and Monghiben closed the door from inside and their pelting bricks in the `fali' of their house. The prosecution case is that the accused Nos. 2, 3, 4 and 5 could be traced together only on 26-9-1992 near village Ganod and at the time when they were arrested, blood stained clothes were seized from their body.

2.1 The prosecution case also is that the weapons which were used by these accused persons in causing injuries to Hareshbhai were discovered at their instance under various discovery panchnamas and that five of these weapons as well as the clothes which were seized from the accused Nos. 2, 3, 4 and 5 were having blood stains of human blood, which as per the Serologist's report, was of group `B' in each case. According to the prosecution, the `Jhabba' which was having multiple cuts due to various blows inflicted on Hareshbhai and which Hareshbhai had removed to press it against his bleeding wounds, was seized from the `fali' (courtyard) of the house of Gigabhai and on analysis, that article was also found to be having blood stains of group `B' blood. The articles which were removed from the dead body of Hareshbhai at the hospital under the panchnama exh.27 and which were also forwarded for analysis were found to be having blood group of `B'. Similarly, some of the bricks

which were allegedly thrown by the accused persons when they had climbed over the rooms of the house of Gigabhai as well as blood stained earth collected from the `fali' were also on analysis found to be having blood of group `B'.

2.2 It was also the prosecution version that the accused persons had ample motive to commit the offence. On 2-2-1992, FIR mark 12/29 was lodged by one Sudhaben against the accused Nos. 3 and 1 for the offences under sections 452, 354, 504 read with section 114 of the Indian Penal Code against these two accused persons and it was alleged therein that while trying to save the complainant from an attempted rape, Hareshbhai who was the Sarpanch at that time, had given a blow on the head of the present accused No.1 - Koli Kaliya. The prosecution version also is that Koli Kaliya had filed an FIR mark 12/30 on 2-2-1992 against Hareshbhai Jivkubhai i.e. the deceased in the present case and two women. Furthermore, the accused No.3 Kiran who was formerly a Upa Sarpanch, by getting Hareshbhai involved in a false case. The accused Nos. 2, 3 and 4 are real brothers and the accused No.5 is their cousin brother. There was, therefore, ample motive for the accused persons to take revenge against Hareshbhai. According to the prosecution, it was established beyond any doubt that all the six accused persons had, by forming an unlawful assembly, attacked Hareshbhai on 15-9-1992 in the morning and inflicted as many as 18 incised wounds and achieved the common object of causing murder of Hareshbhai.

3. All the accused were charged for the offences under sections 143, 144, 146, 148, 302 read with section 149, in the alternative section 302 read with section 34 of the Indian Penal Code and section 37(1) read with section 135 of the Bombay Police Act, by Charge exh.1 on the aforesaid facts.

4. The trial Court in a detailed judgement on the basis of the evidence on record found that it was established by the prosecution that all the six accused persons had, on 15-9-1992, formed an unlawful assembly with the common object of intentionally causing death of Hareshbhai Jivkubhai and had attacked him with sharp cutting instruments like knives and gupti with a view to achieve their common object and caused him serious injuries with these weapons, which were sufficient in the ordinary course of nature to cause death and that, as a result of these injuries, Hareshbhai died homicidal death. The trial Court negatived the contentions which are sought to be raised before this Court also and

convicted all the six accused persons for the offence under section 302 read with section 149 of the Indian Penal Code.

5. The four learned counsel appearing for the accused persons have contended before us that the story narrated by the so called eye witnesses was highly improbable and it was not possible that six persons would be assaulting simultaneously with sharp cutting instruments like knives and a gupti resulting in eighteen wounds. It was submitted that there was nothing on record to show as to how these six accused persons come to know that Hareshbhai was to pass from near the place where they are said to have attacked him. It was submitted that though it may have been established that a crime was committed, the perpetrators of the crime were required to be proved by cogent evidence and this has not been done in the instant case. In the FIR, two unknown persons were shown to have been there amongst the six assailants whose names, or description, were not disclosed and there has been a deliberate introduction of eye witnesses only after making of the entry exh.57 in the station diary with a view to boost up the prosecution story. According to the learned counsel, the FIR exh.83 appeared to have been recorded after the recording of the statements of witnesses and after the investigation had already commenced and if that document is ignored and the entry exh.57 was taken to be the FIR, there was no disclosure of the names of any the accused, nor did the prosecution version figure in that entry. It was submitted that delay in lodging the FIR was deliberate and for the purpose of concocting the story against the accused persons. It was further contended that the entire incident had occurred in a broad daylight and there were many passersby on the road, yet no independent witnesses were examined by the prosecution in support of its version. Only interested witnesses taken from the same `fali' were examined by the prosecution. It was then contended that the medical evidence did not corroborate the eye-witnesses and there was conflict on material aspects between the medical evidence and the ocular evidence. As per the medical evidence, out of the eighteen injuries inflicted on Hareshbhai, six were sufficient individually to cause his death instantaneously and yet, the prosecution has developed the story that Hareshbhai had, after being given these injuries, entered the `deli' of the house of Gigabhai. According to the learned counsel, in view of the nature of serious injuries, Hareshbhai could not have walked any distance and entered into the house of Gigabhai. Furthermore, no mud sample was collected from the alleged

spot where Hareshbhai was assaulted, nor was any blood trail detected therefrom to indicate that he had gone from that spot through the `deli' into the house of Gigabhai. It was submitted that absence of blood marks in the open space where the attack is said to have taken place shows that the incident may have occurred elsewhere. It was also contended that no test identification was held during the investigation and therefore, no reliance can be placed on the identification made by the witnesses in the Court. It was also contended that the motive alleged does not fit in with the pattern of the crime. The learned counsel appearing for the accused No.6 submitted that so far as the accused No.6 was concerned, no motive was alleged at all. It was further submitted by all the learned counsel that the discovery panchnamas could not be relied upon, because, most of the panch witnesses had turned hostile which would show that the investigation was not straight forward. It was also submitted that the shoes which were recovered from the dead body of Hareshbhai were not having any mud on them, which falsifies the prosecution version that blood stains could not be detected in the open space where Hareshbhai is said to have been assaulted by these six accused persons due to rain. It was submitted that profuse bleeding that would take place because of such incised wounds, would have resulted in blood being found from the spot where the assault was committed and since this was not detected, the benefit should go to the accused by holding that the place of occurrence was not satisfactorily established. They further argued that there was a major discrepancy in the blood group of the deceased which was noted in the post mortem notes and deposed to by the medical expert and the group which was detected on various articles which were forwarded for a report of the Serologist. It was submitted that the post mortem notes mention that the blood group of the deceased was `O', while as per the Serologist's report, the blood group was `B'. In view of this discrepancy, the possibility of the investigating agency trying to use the planted articles to connect the accused persons with the crime cannot be ruled out and the benefit of such discrepancy should go to the accused persons, because, it would appear that the blood which was detected on various articles including the weapons which were discovered under the panchnamas, was of some person other than Hareshbhai. It was further argued that all the eye-witnesses were interested and chance witnesses, whose testimony did not inspire any confidence. The conduct of witness Jivkubhai was assailed as unnatural, because, as a father of Hareshbhai, he did not even react when his son was being

seen by him assaulted by six persons with knives and a gupti. Since Jivkubhai had not satisfactorily explained his presence near the scene of the offence, he should be treated as a `chance witness'. He was also an interested witness being related to the deceased. It was submitted that the version of all the witnesses was exaggerated and there were material improvements made in their evidence making them unreliable. It was also argued that the story that all the six accused persons climbed over the house of Gigabhai was highly improbable, because, if they were holding knives in their hands, it was not possible for them physically to climb over the wall and go on the top of the rooms of Gigabhai's house. Therefore, even the partial eye-witnesses who are said to have witnessed the six persons climbing over the house of Gigabhai and throwing bricks, were highly unreliable. As regards the witness Damuben, it was submitted that she was a child witness of 13 years of age and it was not even ascertained as to whether she understood the sanctity of oath and therefore, no implicit reliance can be placed on her deposition. All the learned counsel, therefore, submitted that their appeals should be allowed and all the accused should be acquitted of the charges for which they have been convicted.

5.1 In support of their contentions, the learned counsel for these accused persons relied upon the following decisions :

[a] The decision of the Supreme Court in Rameshwar Singh v. State of Jammu & Kashmir, reported in AIR 1972 SC 102 was cited for the proposition that identification of the accused by the concerned witness where the accused is not previously known to the witness furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to the furnishing corroboration of the evidence to be given by the witness later in court at the trial and from this point of view, such identification is a matter of great importance both for the investigating agency and for the accused. The decision of the Supreme Court in Mohanlal Gangaram Gehani v. State of Maharashtra reported in AIR 1982 SC 839 was also relied upon for the same proposition.

[b] The decision of the Supreme Court in Chhabi Nath v. State of U.P. reported in AIR 1988 SC 345 was cited for the proposition that failure to

state identity of the accused in the FIR raises a reasonable doubt about complicity of accused in crime and was relied upon by the learned counsel for the accused Nos. 5 and 6 whose names did not appear in the FIR. It was held that, in a case of decoity occurring in the darkness of the night, the evidence of the test identification should be carefully scrutinised and in such case where the eye witnesses, on their own admission, did not know the appellants before the occurrence, their identification of the accused persons for the first time in the dock after a long lapse of time would have been improper.

[c] The decision of the Supreme Court in Raju alias Rajendra v. State of Maharashtra reported in 1998 SCC (Cri.) 296 was cited to point out that, in that case, in absence of any test identification held for identification of one of the accused immediately after his arrest, the Court found it difficult to solely rely upon his identification by the witnesses for the first time in Court. It may be noted from para 8 of the judgement that so far as the accused No.2 was concerned, it was admitted by the witnesses that they saw him for the first time on the day of the incident. As regards the identification of accused No.1 which is discussed in para 7 of the judgement, it was found that he was known to both the witnesses from before and in such circumstances, their identification of the accused No.1 as one of the two miscreants who assaulted the deceased with stone, cannot be questioned.

[d] The decision of the Supreme Court in Varghese v. State of Kerala reported in 1998 SCC (Cri.) 890 was cited to point out that it was held, in a case where the articles were found lying in the open in a paddy field, that mere recovery of a knife and gloves in the presence of the accused cannot be regarded as sufficient for connecting the accused with the commission of crime.

[e] The decision of the Supreme Court in Kali Ram v. State of Himachal Pradesh, reported in AIR 1973 SC 2773 was cited for the proposition that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is in favour of the accused should be adopted. It

was observed in that case that this principle had a special relevance in cases wherein the guilt of the accused was sought to be established by circumstantial evidence.

[f] The decision of the Supreme Court in B.N. Singh v. State of Gujarat, reported in AIR 1990 SC 1628 was cited to point out that in a case where it was stated that the accused had surrounded the deceased and were beating him, it would not have been possible for them to cause injury without causing hurt to the persons holding the accused. In that case, it had been stated that the three accused persons had stabbed four or five times on the chest and thighs of the deceased and three other persons were holding his hands. On the facts of the case, the Supreme Court held that the evidence of witnesses was untrustworthy.

[g] The decision of the Supreme Court in Pohalya Motya Valvi v. State of Maharashtra, reported in AIR 1979 SC 1949 was referred to for the proposition that the recovery of murder weapon becomes incriminating not because of its recovery at the instance of the accused, but because the element of criminality tending to connect the accused with the crime lies in the authorship of concealment, namely, that the appellant who gave information leading to its discovery was the person who concealed it.

[h] The decision of the Supreme Court in Makhan Singh v. State of Punjab, reported in AIR 1988 SC 1705 was cited to point out that it was held that since the exclusive knowledge of the discovery of the dead bodies could not be attributed to the accused, the evidence under section 27 cannot be said to be a circumstance against the accused. In para 11 of the judgement, it was observed that, there was no other corroborative evidence about the extra judicial confession and that as rightly conceded by the learned counsel for the State the extra judicial confession was a weak peace of evidence and was hardly of any consequence.

[i] The decision of the Supreme Court in Dudh Nath Pandey v. State of U.P. reported in AIR 1981 SC 911 was cited to show that in a case of circumstantial evidence, the evidence of recovery of pistol at the instance of the accused was held

not by itself sufficient to prove that it was he who pointed out the weapon wielded it in offence. In that case, it was observed that the statement accompanying the discovery was woefully vague to identify the authorship of concealment with the result that the pointing out of the weapon may at best prove the appellant's knowledge as to where the weapon was kept.

[j] The decision of the Supreme Court in Trimbak v. The State of Madhya Pradesh, reported in AIR 1954 SC 39 was cited to point out that the Supreme court held in that case that when the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The fact of recovery by the accused was compatible with the circumstances of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles. That was a case under section 411 of the Indian Penal Code and the Supreme Court observed that it was settled law that the presumption of the innocence of an accused person is reinforced by an order of acquittal and thus, where in an appeal against the acquittal the High Court's approaching the case as if it was an appeal against the conviction and taking the view that the accused having given no explanation regarding his knowledge of the place from which the ornaments were taken out, it must be presumed that he must have kept the ornaments there and that the fact that the field did not belong to the accused and place was accessible to others would not show that the ornaments were not in his possession, was not a correct way of approaching the decision of the case under section 411 of the IPC.

[k] The decision of the Supreme Court in Rameshwar Kalyan Singh v. The State of Rajasthan, reported in AIR (39) 1952 SC 54 was cited for the proposition that it was desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think so, otherwise, the credibility of the witness may be seriously affected so much so, that in some cases it may

become necessary to reject the evidence altogether. It was observed that, whether the Magistrate or Judge really was of that opinion can, however, be gathered from the circumstances when there is no formal certificate. One can presume that the Judge had that in mind from the fact that he examined the child after referring to a fact which arises out of the proviso to section 5 of the Oaths Act.

[l] The decision of the Supreme Court in Bahal Singh v. State of Haryana, reported in AIR 1976 SC 2032 was cited for the proposition that if a chance witness happens to be a relative or friend of the victim or inimically disposed towards the accused, then his being a chance witness is viewed with suspicion. The Supreme Court also held that such a piece of evidence is not necessarily incredible or unbelievable, but does require cautious and close scrutiny.

[m] The decision of the Supreme Court in Lakshmi Singh v. State of Bihar, reported in AIR 1976 SC 2263 was cited to point out the observation of the Supreme Court from paragraph 13 of the judgement that, in almost all criminal cases, the blood stained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report alongwith the earth is produced in the Court. It was observed that since this procedure was departed from for reasons best known to the prosecution, it would also show that defence version may be true.

[n] The decision in Sataji Nathaji v. State of Gujarat, reported in 17 GLR 254, the judgement of a Division Bench of this Court was cited for the proposition that it is always desirable to resort to a preliminary examination of a child witness which will tend to disclose his capacity and intelligence and the record of such preliminary examination, if maintained, will enable the appellate Court to apply its own mind and to review the decision of the trial Court if it arises on these matters. It was held that even if the evidence of such witness was not rejected outright, the appellate Court might experience handicap in the process of assessment of the evidence of such witness. The Court however held that it was a rule of prudence, though there is no legal requirement, that it is not only

desirable that a preliminary examination of a child witness should be made by the Court, but a formal record of such examination should also be maintained.

[o] The decision of the Supreme Court in Juwarsingh Bheraji v. State of Madhya Pradesh, reported in 1980 (Supp) SCC 417 was cited to point out that in a case where the prosecution witness was unable to explain why she failed to mention the names of seven persons in the FIR and had frankly stated that she cannot state the reasons as to why their names were not mentioned, the Supreme Court held in paragraph 6 of the judgement that those seven persons were entitled to a benefit of doubt and should be acquitted.

[p] The decision of the Supreme Court in Ram Narain v. The State of Punjab, reported in AIR 1975 SC 1727 was cited to point out that in a case where the evidence of witness for the prosecution was found to be totally inconsistent with the medical evidence or the evidence of the ballistic expert, it was treated as a most fundamental defect in the prosecution case and the court held that unless reasonably explained, it is sufficient to discredit the entire case.

[q] The decision of the Supreme Court in Milkiyat Singh v. State of Rajasthan, reported in AIR 1981 SC 1579 was cited for the proposition that if in a murder case, part of the prosecution story is found doubtful, the rest of the story told by the alleged eye witness must be examined carefully before it is relied on. It was observed that the fact that the part of the prosecution story is found doubtful, would not necessarily falsify the whole account.

[r] The decision of the Supreme Court in Darshan Singh v. State of Punjab, reported in AIR 1983 SC 554 was cited for the proposition that the fact that the names of some accused were not mentioned in the FIR is a circumstance which the prosecution has to explain, though no rule of law stipulates that the accused whose name is not mentioned in an FIR, is not entitled to an acquittal.

6. The learned Additional Public Prosecutor,

supporting the reasoning and findings of the impugned decision, submitted that there was reliable evidence of the prosecution witnesses to establish the guilt against all the accused persons. He submitted that Navagadh was a small village with a population of hardly 2000 persons and the illiterate women who have deposed before the Court cannot be disbelieved because of some minor discrepancies or inconsistencies. It was submitted that women in a small village who may be knowing their neighbours would not necessarily know the names of all the males whom they may be knowing by face and merely because names of the accused Nos. 5 and 6 were not mentioned in the FIR, while stating that the informant knew them by face, will not discredit the version of the informant before the Court, nor will it in any way affect the testimony of other witnesses who had known all the accused persons. It was submitted that where the accused persons were known, there was no need for any identification parade and therefore, no adverse inference could be drawn for not holding the identification parade. According to the learned counsel, the eye-witnesses knew all the accused persons and even if some of them did not remember their names, that would not justify an inference that some strangers had committed the assault. It was contended that the incident occurred in a broad daylight and all the witnesses had sufficient opportunity to identify the accused persons. It was submitted that the witnesses had clearly identified all the accused persons before the Court. These accused persons were attributed the weapons with which they had committed the offence and the fact that there were eighteen injuries found on the body of the deceased clearly corroborated their version of attack by the six persons causing multiple wounds by knives and a gupti. It was submitted that on all material particulars, the eye-witnesses have supported the prosecution version. It was further contended that Damuben who was 13 years of age had witnessed the entire incident while she was standing outside the `deli' when the assault began and she already knew all the accused persons whom she identified before the Court. Her evidence cannot be brushed aside on the ground that she was a child witness. She had no interest in the matter and her version appeared to be truthful. It was also submitted that Bishubhai and Induben who were two other eye-witnesses were the residents of that very house of Gigabhai in which Bishubhai was a tenant and their being found in and around the house was but natural. It was also submitted that, due to moist climate on that day when it was drizzling, no work could have been carried out in a dyeing factory and therefore, there was nothing unusual in Jivkubhai who appeared to be a daily wager,

coming back to his house and then again going out for the bazar and passing on the road where he saw the incident of his son being assaulted by the six persons at some distance ahead of him. It was submitted that even witness Inaben and Monghiben had seen these accused persons whom they had already known and they have stated that these accused persons had climbed over their house and were pelting bricks. It was contended that the accused No.5 was residing very near the house of the informant Geetaben and even on the suggestion made to the prosecution witness on behalf of the defence, he was staying since few years just a couple of houses away from the house in which the informant was staying at the time of incident. Therefore, even if the informant did not know the name of the accused No.5, she had already known him to be the person who was residing in a nearby house for quite some years. The learned counsel further argued that the accused persons had a strong motive for attacking Hareshbhai, because, the accused No.2 had become the Sarpanch after implicating Hareshbhai, who was the former Sarpanch, in some court cases. He submitted that there was already an FIR lodged against the accused Nos. 1 and 3 on 2-2-1992 as per mark 12/29 by one Sudhaben who made a charge that they had tried to misbehave with her and in saving her from being ravished, Hareshbhai, Sarpanch who had come suddenly, had given a pipe blow on the head of Kaliya Koli (the present accused No.1). He also submitted that there was an FIR lodged by the present accused No.1 Kalu Magan Koli on 2-2-1992 just 20 minutes after the FIR filed by Sudhaben in which the present accused No.1 had alleged an assault on him by Hareshbhai Jivkubhai (the deceased in the present case) and two ladies Jashiben and sister in-law of Chatugar which indicated that he bore a grudge against Hareshbhai. The learned Additional Public Prosecutor further contended that the accused Nos. 2, 3, 4 and 5 who were absconding were apprehended together near `Ganod Patiya' on 26-9-1992 when they tried to run away, as noted in the panchnama of their arrest. It was submitted that blood stains were found on the clothes of these accused persons, which were seized at the time of their arrest, as per the reports of the chemical analyzer and the serologist. He submitted that the weapons which were seized except the knife recovered at the instance of the accused No.6, also were all found to be having human blood of `B' group. He, therefore, submitted that there were circumstances which re-assured the version given by the prosecution witnesses and the trial court was, therefore, perfectly justified in convicting all the accused for the offence under section 302 read with section 149 of the Indian Penal Code.

6.1 In support of his contentions, the learned Additional Public Prosecutor relied upon the following decisions :

[a] The decision of the Supreme Court in Modan Singh v. State of Rajasthan, reported in AIR 1978 SC 1511 was cited for the proposition that if the evidence of investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version.

[b] The decision of the Supreme Court in Solanki Chimanbhai Ukabhai v. State of Gujarat, reported in AIR 1983 SC 484 was cited for the proposition that the value of medical evidence is only corroborative and it proves that the injuries could have been caused in the manner alleged and nothing more, and further that the testimony of eye witness cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence unless the medical evidence goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses.

[c] The decision of the Supreme Court in Rana Pratap v. State of Haryana, reported in AIR 1983 SC 680 was cited for the proposition that in a murder trial by describing the independent witnesses as `chance witnesses', it cannot be implied thereby that their evidence is suspicious and their presence at the scene is doubtful. The Supreme Court observed that murders are not committed with previous notice to witnesses; soliciting their presence. It was observed that if a murder is committed in a street, only passersby will be the witnesses and their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere `chance witnesses'. The expression `chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. It was held that to discard the evidence of street hawkers and street

vendors on the ground that they are `chance witnesses', even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence. It was also held that the evidence of witnesses cannot be discarded on the ground that they did not react in a particular manner. The Supreme court observed that everyone reacts in his own special way and to discard the evidence of witness on the ground that they did not react in any particular manner, is to appreciate the evidence in a wholly unrealistic and unimaginative way.

[d] The decision of the Supreme Court in Mohmed Inayatullah v. The State of Maharashtra, reported in AIR 1976 SC 483 was cited in context of section 27 of the Evidence Act to point out that the expression `fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this.

[e] The decision of the Supreme Court in Mst. Dalbir Kaur v. State of Punjab, reported in AIR 1977 SC 472 was cited to point out that it was held therein that a close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an `interested witness' and that the term `interested' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus against the accused or for some other reason. This decision was relied upon by the learned counsel also for the proposition that where the police officers were examined to prove the search, but the other witnesses were not examined, that by itself would not introduce any serious infirmity in the evidence furnished by the recoveries which at best was only a corroborative piece of evidence.

[f] The decision of the Supreme Court in Punjab Singh v. State of Haryana, reported in AIR 1984 SC 1233 was cited for the proposition that if direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence.

7. There is no dispute about the fact that

Hareshbhai Jivkubhai died a homicidal death on 15-9-1992 as a result of multiple injuries that he received on that day in the morning. Prosecution witness No.12 Dr. Chandulal Bhanjibhai Barochiya in his deposition exh.37 has narrated eighteen incised wounds which he noticed on the body of Hareshbhai. He had started the post mortem of the body at 11.50 a.m. and completed the same at 2.30 p.m. The post mortem report is at exh.38. In column 17 of the report, multiple sharp and stabbed injuries which were noted on the body of Hareshbhai were described as under :

"[1] Incised wound on the side of neck size : 2" x 1" x 1", deep muscle & neck vessels; cut severe bleeding.

[2] Stab wound - Bone deep just below left clavicle at medical end. Size 1.1/2" x 1/2" x 1/2" cut severe bleeding. No bone fracture.

[3] Stab wound below right eye. Size 1" x 1/2" upto maxilla bone & maxilla bone. Fracture.

[4] Incised wound 1.1/2" below right ear to right shoulder 8" long first 4" x 5" deep x 1.1/2". Then other 4" are superficial. First 4" wound deep 5" & cut major neck vessels & muscles and also ruptured right lung cut severe bleeding. No bone fracture.

[5] Incised wound on right side of chest at 4th and 6th rib. Size 4" x 2" x 6" depth, 5th rib cut out facture. Right lung and its vessels ruptured cut severe blood loss.

[6] Stab wound on right side of chest between 8th and 9th ribs. Size 2" x 1" x 3" depth. Pleura lung & its blood vessel ruptured. No bone fracture.

[7] Stab wound on right mid auxiliary line at lever; of 8th rib. Size 1" x 2" x 1" depth upto bone muscle and blood vessel cut. No fracture.

[8] Half round shape incised wound at 3" above right elbow joint of about 2" diameter and cut only muscle and its vessel. No fracture.

[9] Incised wound 4" above left elbow joints. Size 5" x 2" upto bone deep cut muscles cut & its vessel also cut. No bone fracture.

[10] A stab wound on left shoulder. Size 1" x 1/2" x 1/2" depth. Muscle cut. No fracture.

[11] Incised wound of 2" above left wrist joint. Oblique in nature. Size 5.1/2" x 1/2" x deep upto bone, but no fracture, severe bleeding.

[12] Incised wound on the back of chest vertical in nature at left scapular region. Size 1.1/2" x 1.1/2" upto bone deep. No fracture.

[13] 2" below No.12 injury - incised wound 3.1/2" x 1" x 1/2" oblique in nature deep upto muscles. No fracture.

[14] Superficial incised wound 2" below left scapular Angles 6" x 1/4" bleeding.

[15] Incised wound on left lower and lateral 10th and 11th rib. Size 4.1/2" x 1" x 4" depth. Seritonium and spteen ruptured. Also its blood vessel cut. No fracture.

[16] Half round shape wound cut below 1" No. 15 injury diameter 2" about deep. 3/4" cut muscle. No fracture.

[17] An incised wound on right side lateral to spinal at 6th rib. 1.1/2" x 3" depth x 1/2" muscles cut, its vessels also. No fracture.

[18] Incised wound on right side of chest at lever of 9th rib. Size 2" x 1/2" x 1" depth cut muscle and vessels cut. No fracture."

8.1 The cause of death was shown to be excessive haemorrhage due to multiple injuries on the vital part of the body by sharp cutting and stabbing instruments. The medical expert has deposed that all the injuries were antemortem and that the internal injuries corresponded to the external injuries. He has stated in paragraph 4 of his deposition that all these external injuries were possible by the muddamal knives Articles Nos. 14, 19, 20 (gupti), 21, 22 and 23. According to him, each of the external injuries Nos. 1, 4, 5, 6, 12 and 15 was sufficient in the ordinary course of nature to cause immediate death of the deceased. In his cross-examination in paragraph 10, he has stated that the injuries Nos. 2, 4 (heart), 5, 6, 7, 10, 12, 13, 14, 15, 16, 17 and 18 (in all thirteen) were such as would cause

cut marks if the deceased had worn a `zabba' at the time when injuries were inflicted. His detailed cross-examination which apparently was meant to confuse him by reference to various injuries has not at all affected the substratum of his version that all the injuries which were noticed on the body of Hareshbhai during the post mortem examination were antemortem and they could be caused by sharp cutting instruments like the muddamal knives and the `gupti' which were shown to him. His deposition that thirteen out of the eighteen injuries were such as would cause corresponding cut marks on the `zabba' worn by the deceased, is corroborated by the report of the FSL, as can be seen from the report at exh.35 collectively, in which while describing the muddamal `zabba', thirteen cut marks thereof have been enumerated. In the said report, it is stated that on a scientific examination of the edges of various cuts which appeared on the `zabba' and the edges of the muddamal five knives and the `gupti', it was opined that the thirteen cut marks which appeared on the muddamal `zabba' were possible by the muddamal knives and `gupti'.

7.2 In the post mortem notes exh.38, the body of the deceased was described as well built and it was a "fresh dead body". The post mortem had started at 11.50 a.m. on that very day i.e. 15-9-1992. The column 7 of the post mortem notes shows that it was a dead body of a male aged about 35 years who had put on a white pant (`lengha' as per the evidence), black pair of shoes of rubber foam and a white metal ring which all were blood stained. As per the panchnama exh.27 which was admitted during the trial by an endorsement made on behalf of the accused persons by their counsel on list exh.12 under which it was produced at Srl. No.6, these articles which were described therein as blood stained, were seized. In the inquest panchnama exh.42 which is proved in the deposition of panch witness Nathabhai exh.41, these three articles are specified as articles which were on the body of the deceased at the time when the inquest was made at about 10.45 a.m. It is mentioned in the penultimate paragraph of the panchnama exh.42 that the black shoes of size 11 were blood stained and the white `lengha' which were on the dead body was also blood stained. It was stated that white metal ring, white `lengha', black shoes of size 11 of Niklon Company, towel etc. were seized by the police. The muddamal receipt shows that these three items were seized and at that time, they were all blood stained. These items were forwarded to the FSL for analysis under the forwarding letter exh.33 which was admitted in evidence as per the consent recorded on the list exh.12. These items which were seized under

muddamal receipt No. 207 of 1992 are referred at item No.8 and the packet in which they were sealed is shown as mark `B'. This parcel mark `B' which contained `lengha', shoes of both the feet and towel which are described as Articles No.12, 11 and 13 respectively. In the chemical analyzers report exh.35, these articles were found to be having human blood and as per the serologist's report attached therewith which is also at exh.35, the said blood was of `B' group on all these articles. The authenticity of these articles having been seized from the body of the deceased at the time of post mortem examination and forwarded for chemical analysis and of the reports of the chemical analysis, establishes beyond any doubt that the blood group of the deceased was `B'. We have emphasized this aspect at this initial stage, because, it was sought to be contended that in the post mortem notes the blood group of the deceased was described as `O'. In view of the serologist's report in respect of these three items which were removed from the dead body of Hareshbhai and sent for chemical analysis, the blood group of the deceased was `B' and the mention of `O' group in the post mortem notes is obviously wrong. Even the other items which were forwarded to the FSL which included the bricks containing blood stains as well as the blood stained `zabba' with thirteen cuts and the blood stained soil which was collected from the `fali' of Gigabhai's house, were all found to be having human blood of group `B' as per the chemical analyzers report and the serologist's report exh.35. There is, therefore, absolutely no scope for contending that the blood group of the deceased was `O' as mentioned in the post mortem notes in respect of which no analysis certificate was produced.

8. The complainant Geetaben in her deposition exh.16 has stated that, since three years prior to the day of the incident, she was residing with her parents at Navagadh as she had some dispute with her husband. Hareshbhai was the eldest of her four brothers. In the morning, Hareshbhai had gone out of the house at about 9 o'clock, because, he had to go to Gondal Court where the case against her brother Kamlesh was to come up for hearing. After Hareshbhai left the house, she also went out to inquire about the health of Monghi Maasi who was residing in `Chamunda Nivas' on Rajkot Dhoraji road in Navagadh. On her way, Damuben, a young girl of about 13 years met her and had accompanied her at her request. Monghi Maasi was having pain in her chest. In the house of Monghi Maasi, her daughter Inaben and tenants's wives Induben and Samjuben were present. While she was sitting with Monghi Maasi, she heard shouts, `Kiran leave me,

Lalit leave me, Ramesh leave me'. On hearing these shouts, they came out and she saw that her brother Hareshbhai was profusely bleeding. She has stated that the shouts that she had heard was of her brother who entered in the `fali' of the house screaming and profusely bleeding. The persons who had attacked him were present there and all of them were having blood stained knives and their clothes were also blood stained. According to her, Monghi Maasi closed the `deli'. When the `deli' was closed, these persons started shouting that Hareshbhai should be sent out, otherwise they would set the house on fire. They however did not open the `deli'. Therefore, the accused Nos. 2 and 3 climbed over the `deli' and the other four persons also climbed over the house and these six persons having climbed over the house started throwing bricks which were placed for fixing the tiles. They were throwing the bricks in the `falia' (a small open courtyard). They were wanting to hit Hareshbhai, but since Hareshbhai was standing against the side wall, the bricks did not hit him. Thereafter, Hareshbhai leaning on the wall walked into the room of Monghi Maasi and fell on a cot which was lying there. She saw that Hareshbhai had several knife blows on his chest and he muttered in an unconscious state, `Kiran leave me' and thereafter, he did not speak anything. She tried to call him, but he did not respond and therefore, she started crying. Thereafter, she and Monghi Maasi sat by his cot and all the six assailants had gone away. She has stated that, among the assailants were the accused Nos. 1, 2, 3 and 4, and alongwith these four, there were two other persons whom she knew by their looks. She had now come to know the names of those two other persons and she identified the accused No.5 as Ashok and accused No.6 as Vinu. She identified all the six accused persons before the Court as the persons who had assaulted her brother Hareshbhai. She has stated that all the accused persons were having knives and of which Ramesh was having a longer knife. She has then stated that thereafter her father had entered the house and after seeing Hareshbhai, had gone away. Thereafter, Hareshbhai was taken in an ambulance to the civil hospital. She, her mother, who had by that time come there, and Malubha had all gone to the hospital. At the hospital, she was told by her uncle that Hareshbhai was dead and that they should go home. She, her mother and Malubha, therefore, went home. After sometime, the police had arrived at her house and her complaint was recorded. She has stated that the incident had taken place because her brother Hareshbhai was formerly a Sarpanch and the accused No.2 was an Upa Sarpanch and by making a false case against her brother, he was got suspended and therefore, their relations were

estranged. She has stated that the accused No.2 Kirangiri had got filed one theft case against her brother and this was done because her brother had tried to save one girl whose modesty was being outraged by the accused No.1 Kaliyo and accused No.3 Lalitgiri. As a result of this, her brother had to stay for a couple of days in jail. In paragraph 5 of her deposition, in the cross examination, she when asked by the counsel for the accused persons to name the accused persons went near the accused persons and identified them as accused Nos.1, 2, 3 and 4 by their names and as regards the accused Nos. 5 and 6, she identified them as the persons whose names she did not know on the day of incident and had told the police that one of those two was of Navagadh and the other was of village Dhank. She has stated that the accused No.5 whose name she did not know at that time and who was residing in Navagadh was residing in the locality next to her house. It was suggested to her that, the accused No.5 Ashok was residing next to her house, but she stated that he was residing a little far. In her cross-examination, she has maintained that she had seen all these accused persons hardly five feet away from the `deli' of that house. She has also stated that when her brother had entered the `deli', he had taken out the `zabba' and had pressed it against the wounds which were bleeding. She has stated that the bricks which were thrown in the `falia' by the accused persons did not hit him. While these accused persons were throwing bricks, her brother was trying to get into the room and she was in the `fali'. She has denied the suggestion that she had wrongly identified the accused No.5 as one of the persons whose names she did not know on the day of the incident. It was suggested to her in the cross-examination that she had known the accused No.5 - Ashok by name since many years, but she denied the same.

8.1 It was tried to be contended on behalf of the accused persons that this witness had not named the accused No.5 Ashok, though he was residing very near to her house and that it is not possible that she was not knowing the name of Ashok on the day of the incident. It is not necessary that a rural female in Indian society should know the name of a neighbouring male even when she knows him by face. There is nothing unusual in Geetaben's not knowing the name of this person who was residing in her vicinity since some years prior to the date of the incident. On the contrary, the fact that accused No.5 was residing near her house for some years prior to the incident would show that she was in a position to identify this person at the time when he was assaulting, alongwith others, her brother though she may

not have known his name at that time.

8.2 The deposition of Geetaben is fully corroborated by her earliest version in the FIR exh.83 which was recorded at 12.00 noon on 15-9-1992. In the FIR exh.83 also, she had named the accused Nos. 2, 3, 4 and 5 and two other persons whose names she did not know, as the persons who assaulted her brother with knives on the day of the incident. It was also stated in the FIR that she had come to Monghiben's house alongwith Damuben who had accompanied her on her way and that in Monghiben's house, Monghiben's daughter Inaben was also present and in the other rooms, Induben and Samjuben were also there. Around 9.30 a.m., she heard the shouts of her brother Hareshbhai, `Kiran leave me, Lalit leave me' and on hearing the shouts, she and others had seen that he was profusely bleeding. He entered the `falia' of the house and she saw that the accused Nos. 1, 2, 3 and 4 and two other persons were having knives in their hands and were trying to follow her brother into the house. Her Maasi therefore closed the `deli' from inside. The accused No.2 had shouted that the house should be opened otherwise they will set it on fire. Samjuben's children started crying. She has also stated that all the six accused persons who had knives in their hands, had climbed over the rooms of the house and were throwing bricks at her brother who shouted, `Kiran leave me, Lalit leave me' and entered the room of her Maasi and fell on the cot which was lying there. Her brother spoke `Lalit leave me' and then became unconscious. Thereafter, all the six accused persons who were holding knives in their hands had gone away. When an ambulance had come and her brother was taken to the hospital, she alongwith her mother and Malubha had gone to the hospital where the doctor declared him dead. She has stated in the complaint that the accused Nos. 1, 2, 3, 4 and two other persons whom she knew by face, had by inflicting knife blows and throwing bricks, assaulted her brother and caused his death. She specifically stated that she knew those two unknown persons by face.

8.3 It will be seen that on all material particulars of her version, Geetaben is fully corroborated by her FIR exh.83. It was tried to be contended that there was delay in lodging the FIR, because, the incident had taken place at 9.30 a.m. while the complaint was given at 12.00 noon. There is hardly any substance in this contention. This was the earliest point of time when the complaint could have been recorded, because, immediately after the incident, Hareshbhai had to be taken to the hospital where he was declared dead and the women folk

who had gone in the ambulance taking him to the hospital were thereafter asked to go home by the uncle of Geetaben, because they were not required there. Soon after they reached home, the police had gone to her house and recorded the FIR having come to know that Geetaben knew about the incident. It was contended that the telephonic information which was recorded in the entry exh.57 in the station diary should be treated as FIR. This contention is wholly fallacious. A bare look at the entry exh.57 would show that it was only a cryptic information which did not give any particulars of the cognizable offence which was committed. In this entry, it was recorded at 10.10 a.m. that Dr. Saviaya had telephonically informed that Hareshbhai Jivkubhai, aged about 30 years of Navagadh was injured in `maramari' and had died and his dead body was brought. This is all which was recorded when information about the dead body brought in the hospital was given.

8.4 A cryptic anonymous oral message which did not in terms clearly specify cognizable offence, cannot be treated as First Information Report as held by the Supreme Court in Tapinder Singh v. State of Punjab, reported in 1970(2) SCC 113. In State of U.P. v. P.A. Madhu, reported in (1984) 4 SCC 83, following the decision in case of Tapinder Singh (supra), the Supreme court reiterated that a telephonic message to police that gunshots were being fired, on a cryptic information sent at the moment of utter chaos and confusion during the occurrence is not a First Information Report. Again in Sheikh Ishaque v. State of Bihar, reported in (1995) 3 SCC 392, it was held that a cryptic information at the police station to the effect that there was commotion in the village and firing and brickbatting was going on recorded in police diary could not be treated as an FIR within the meaning of section 154 of the Criminal Procedure Code. In Ramsinh Bavaji Jadeja v. State of Gujarat, reported in (1994) 2 SCC 685, it was held that the question as to at what stage the investigation commences has to be considered and examined on the facts of each case, especially, when the information of a cognizable offence has been given on telephone. Any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as first information report. So, if the telephonic message is cryptic in nature and the officer in charge, proceeds to the place of occurrence on basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information, which had been received by him on telephone, shall be deemed to be first

information report. It was held that the object and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer in charge of the police station to reach the place of occurrence. It was held that the Sessions Judge as well as the High Court were in error in treating the cryptic message given on the telephone by the Head Constable to the officer in charge, as FIR. Under section 154 of the Code, the information must unmistakably relate to the commission of a cognizable offence and it should be reduced in writing and shall be signed by its maker. The further requirement is that the substance thereof shall be entered in a book kept in the police station in the prescribed form. The report of first information has to be prepared and forwarded to the Magistrate empowered to take cognizance of the offence upon such report. The officer in charge of a police station is not obliged to prepare an FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about the commission of the cognizable offence and it is open to the officer in charge to collect more information containing details about the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation in respect thereto, as held by the Supreme Court in Binay Kumar Singh v. State of Bihar, reported in (1997) 1 SCC 283. There is, therefore, absolutely no substance in the contention that the entry in the station diary which is at exh.57 should be treated as FIR. The learned trial Judge was right in treating the exh. 83 as FIR which fully corroborates the version of the complainant - Geetaben.

8.5 From the deposition of Geetaben, it clearly transpires that while she was sitting at the house of Monghi Maasi, at about 9.30 in the morning of 15-9-1992, she had heard the cries raised by her brother Hareshbhai who was injured with knives and was profusely bleeding and that he had entered the `deli' for escaping from further assault. He was shouting the names of the accused Nos. 2, 3 and 4 imploring them to leave him. He had taken out his `zabba' and was trying to stop further bleeding after he came inside the `fali'. All these six persons were after him with knives in their hands and they climbed over the house when the `deli' was closed and threw bricks from the top which fell in the `fali'. Hareshbhai ultimately could manage to reach the cot in Monghiben's room and fell on it and had suddenly stopped screaming. Thereafter, the accused persons went away. All of them were having knives which were blood stained and their clothes were also blood stained. She

identified all the accused persons before the Court. The two persons who were known to her by face, but whose names she did not know on the day of the incident i.e. the accused Nos. 5 and 6, were also identified by her and as noted above, the accused No.5 was in fact residing in her vicinity which fact indeed was suggested on behalf of the accused in the cross-examination of this witness. The omissions which are relied upon are hardly of any consequence and do not affect the substratum of her above version.

9. Witness Bhikhubhai in his deposition exh.17 did not support the prosecution and was cross-examined by the public prosecutor. Even his deposition despite his reluctance to support the prosecution shows that around 9.30 a.m. on the morning of the incident, when he was returning to his house (he was a tenant in Gigabhai's house), he noticed that some fight was going near his house. He therefore stopped at a distance. After sometime the fight had stopped. Thereafter, when he went in his house, he saw Hareshbhai lying on the cot profusely bleeding. In his cross-examination by the Additional Public Prosecutor, he has admitted that on the day of the incident, it was drizzling. In paragraph 3 of his deposition, he has admitted that he had stated before the police that Hareshbhai's father was standing at some distance. He was residing in Monghiben's house since about 2.1/2 months prior to the date of the incident. His deposition shows that the incident did occur at 9.30 a.m. and that there was a quarrel near his house and after that, he had seen Hareshbhai lying on the cot bleeding in the house of Gigabhai. He had seen Hareshbhai's father at some distance at the time of incident.

10. Prosecution witness Bishubhai who has deposed at exh.21 has stated that he knew all the accused persons who were present in the Court and had also known Hareshbhai. He was a tenant in the house of Gigabhai where he was residing with his wife. On the day of the incident, the atmosphere was moist and therefore, dyeing work could not be done and hence, he had not gone for work. At about 8 o'clock, he had gone to the bazaar and at about 9.00 to 9.30 o'clock, he was returning to his house. When he came near his house, he saw that the accused No.3 - Lalitgiri and the accused No.4 Rameshgiri were giving knife blows to Hareshbhai and the accused No.2 Kirangiri and the accused No.5 - Ashokgiri who came from the northern lane were also giving him knife blows. The accused No.1 Kaliya and another person came from the side lane and they also started giving knife blows to

Hareshbhai. Hareshbhai therefore ran and entered into Gigabhai's house through the `deli'. After Hareshbhai had entered the house, the `deli' was closed from inside by someone. He kept on standing on the road. He had thereafter seen these accused persons scaling over the wall from different windows and spots and getting over the house. They started throwing bricks for sometime and thereafter, all of them got down and went running towards Sardharpur gate. Thereafter, he went to the house and saw Hareshbhai lying on the cot, profusely bleeding. Hareshbhai's father, Jivkubhai was standing there stunned and had to be taken to the nearby osri. After about 15 to 20 minutes, an ambulance was brought and Hareshbhai was taken to the hospital. He has stated that Hareshbhai was formerly a Sarpanch of the village and thereafter when the accused No.2 Kiran became Sarpanch, cases were filed, and according to him, the incident had occurred because there were disputes over the elections. In his cross-examination, he denied the suggestion that he was a supporter of Hareshbhai. He has stated that he was residing in Gigabhai's house since 3 to 4 months prior to the incident and before that, he was staying in village Santhali of Taluka Jasdan. He had, in all, stayed in Navagadh for about 5 to 7 years. Earlier, he was residing in house of one Vallabhbhai. In Gigabhai's house, he was using the middle room out of the three rooms. In his cross-examination, he has maintained that when he saw the assailants giving blows to Hareshbhai, initially two of them had given seven or eight blows and thereafter, two others had joined and finally two more who came almost simultaneously with the other two who came from the northern lane also joined in giving the blows. He had seen the incident from a distance of about 15 to 20 feet. After the incident, he saw the assailants running towards Sardharpur gate. He had seen them running for nearly 150 feet. He has stated that untill then the gate of the `deli' had not been opened again. According to him, he knew accused persons since about 5 to 7 years. He knew the accused No.5 since about 5 years. He has stated that there was a distance of about 60 feet between the house of Hareshbhai and the accused No.5 Ashok. He had come to know after the incident that the person whom he described as unknown was Vinu and before the Court, he identified him on being asked by the counsel for the accused, as recorded in paragraph 12 of his deposition. Barring minor omissions, there is hardly anything brought out in his cross-examination which will cast any doubt over his credibility. From his deposition, it transpires that he had known all the accused persons and had seen them from a short distance of about 20 feet when they were giving knife blows to

Hareshbhai. He had seen all of them giving knife blows to Hareshbhai which fact is corroborated by the medical evidence which shows that there were as many as eighteen incised wounds on Hareshbhai. He also saw Hareshbhai entering through the `deli' in the house of Gigabhai where this witness was a tenant. He saw all these accused climbing over the house and throwing bricks and soon thereafter, running away from the spot towards the direction of Sardharpur gate. He then entered the house and saw that Hareshbhai was lying on a cot profusely bleeding. His deposition shows the presence of Hareshbhai's father also in the house soon after the incident. This witness had no enmity against any of the accused and there is absolutely no reason for discarding his version on the imaginary grounds suggested by the learned counsel for the accused. He supported the prosecution version on all material particulars showing the involvement of all these six accused persons in their collective assault on Hareshbhai at the time of the incident that occurred on 15-9-1992.

11. The prosecution witness Induben, wife of Bishubhai in her deposition exh.22 has stated that, on the date of the incident, she was at her house doing her household chores. She has stated that Geetaben alongwith Damuben had come to inquire about the health of Monghiben. In the morning at about 8 o'clock, her husband Bishubhai had gone out. She stated that her husband had not gone for the work because of the rainy atmosphere. When she had gone out of the `deli' to throw the refuge, she heard commotion and saw the fight in which Hareshbhai was given knife blows. She has stated that the accused No.2 Kiran, the accused No.3 Lalit, the accused No.4 Ranglo (Ramesh) and the accused No.5 Ashok and two unknown persons were giving knife blows to Hareshbhai. She identified those two unknown persons in the Court as the accused Nos. 1 and 6, alongwith the other accused persons whom she had named. She stated that these six accused persons were giving knife blows to Hareshbhai. She then stated that the two persons whom she had described as unknown persons were known to her by their looks. After throwing refuge, she had come back in the house. Her children had started crying. She also stated that these six persons had climbed over the rooms of their house and were throwing bricks. In her cross-examination, she also stated that the accused No.5 Ashok was a cousin brother of the accused No.2 Kiran. She has stated that she is illiterate. She can see clearly upto a distance of about 15 to 20 feet, but beyond that, she could not see very clearly. She has stated that, in the ambulance, Geetaben, Kanchanben

(mother of Geetaben) and Maluben had gone, taking Hareshbhai to the hospital. In paragraph 7 of her deposition, she states that when she had gone out of the house for throwing refuge, Damuben was playing outside the house. This witness was a natural witness, because, she was residing as a tenant in that very house in one of the rooms which were opening in the `fali. She had no enmity against any of the accused persons. She had named the accused Nos. 2, 3, 4 and 5 and the accused Nos. 1 and 6 whom she knew by their looks, were identified by her in the Court alongwith the other accused persons. Merely because she has stated that she can see very clearly upto a distance of 15 to 20 feet, it cannot be argued that she had not seen the incident when she has asserted in the deposition that she saw these six accused persons giving knife blows to Hareshbhai and thereafter, when Hareshbhai had entered into the `falia' through the `deli' and the `deli' was closed from inside, they had climbed over the house and had pelted bricks after which they had gone away. The omissions which are tried to be relied upon are insignificant and they do not amount to contradictions and her version cannot be discarded because of any minor inconsistency between her deposition before the court and the statement before the police. We are satisfied from her deposition that all the six accused persons had attacked Hareshbhai and caused him multiple incised wounds with the weapons which they were holding, namely knives and a gupti and that they had, after Hareshbhai went inside the `deli' and the `deli' was closed, scaled over the wall of the house and after getting on to the top of the rooms, had pelted bricks in the open `fali'. This witness supports the prosecution version on all material particulars.

12. The prosecution witness Damuben in her deposition exh.24 has stated that, on the day of the incident, while she was standing in the lane outside her house and Geetaben was passing from there, she asked her whether she would accompany her to Monghiben's house, and therefore, she had gone with Geetaben to Monghiben's house. After she sat for sometime in Monghiben's house, she went out and when she was near the `deli' of the house, she had seen Hareshbhai who was walking on the road and at that time, she saw that the accused No.2 Kirangiri and the accused No.3 Lalitgiri gave knife blows to him. This witness was 13 years of age when she gave the deposition. When she was asked whether the accused Nos. 2 and 3 were present in Court, she replied in affirmative and stated that all the six persons were in the Court and named each of them. She stated in paragraph 3 of her deposition that she knew all the

accused persons, because, they used to frequently pass from her lane. She has then stated that she had seen all these six accused persons whom she named inflicting blows on Hareshbhai who was injured with knives. She has categorically stated that she had seen all these accused persons causing injuries to Hareshbhai with their knives. In her cross-examination, she stated that at the time when she had gone out of the `deli', she had not heard any noise, but after standing there for about five minutes, she saw the entire incident of assault on Hareshbhai. She has stated in her cross-examination that the incident lasted for about 10 to 15 minutes. She also states that she had seen Induben coming out of the `deli' for throwing refuge. She also stated that she was standing at a distance of about 10 feet from the place where the incident occurred and when asked about the distance, she correctly pointed out the distance of 10 feet as noted in paragraph 5 of her deposition. She has then stated that while Hareshbhai was being given knife blows, he was coming towards her direction and he was as near as 7 feet. She stood at the `deli' and shouted. She has denied the suggestion that when she shouted to call Geetaben, only two of the accused persons were inflicting blows on Hareshbhai and others had come thereafter. She has denied that she had entered the house again. She has maintained that she had seen Hareshbhai entering the `deli'. In paragraph 7 of her deposition, she has stated that the accused No.5 - Ashok was residing nearby her house and in-between their houses, there were four or five other houses. She has stated that the accused No.5 - Ashok used to often pass from her lane. The house of Hareshbhai was three or four houses far from her house. She has stated that the accused No.5 Ashok used to stay there since about a year prior to the incident and she knew him since the time that he had come to reside there. She has stated that she used to call Ashok as `Ashko'. She has stated that Ashok and `Ashko' are one and the same person. She has stated that she knew that the accused No.6 Viniyo was of village Dhank. She has also stated that she had seen the accused No.6 Viniyo plying a rickshaw in Navagadh village. She also stated that she knew the accused No.1 Kaliya who was residing in Navagadh in Dhar area. It will be seen from the deposition of this witness that, despite her young age of 13 years, the manner in which she has deposed inspires great confidence. She has stood the test of cross-examination and there is a ring of truth in her deposition. Her presence at the scene of occurrence is fully established not only from her own evidence, but also stands thoroughly corroborated by the depositions of other witnesses. The omissions which are

sought to be relied upon have absolutely no significance and do not at all affect the material aspects of the prosecution version that she supports fully. From her deposition, it clearly transpires that all the six accused whom she had known because they used to pass by her lane and because she had seen the accused No.6 plying rickshaw, were at the time of incident giving knife blows to Hareshbhai and Hareshbhai had entered the `deli', which was closed from inside. She had thereafter gone away to inform Hareshbhai's mother. This is why she has not referred to the later part of the incident, namely of all the accused persons climbing over the building and pelting bricks. There was absolutely no rhyme or reason for this young lady to falsely implicate any of the accused persons. Her deposition was assailed on the ground that there was no record maintained for maintained to show that she understood the sanctity of oath before recording her deposition on oath. We have carefully read her evidence and it becomes at once clear that she was a person who had sufficient understanding for distinguishing between the truth and falsehood and the manner in which she has answered the questions, shows that she knew the sanctity of oath. Her evidence cannot be discarded merely on the ground that there is no record showing that the learned trial Judge had ascertained whether she knew the sanctity of oath. When oath was administered to her, it must be presumed that the learned trial Judge must have mentally ascertained whether she was capable of understanding the sanctity of oath. It would have been better if record was maintained to evidence this aspect, but in absence of maintaining record to show whether the child witness understands the sanctity of oath, there is no valid reason to discard the deposition of such witness just because such written record is not maintained. The appellate Court can after scrutinizing the evidence even in absence of any such record, form its own opinion from the nature of answers given by the witness whether she had understood the sanctity of oath which was administered to her and we are fully satisfied from her deposition that she did understand the sanctity of oath. We are, therefore, inclined to accept her version that, all the six accused persons had attacked Hareshbhai and caused injuries to him by giving knife blows on the date and time of the incident as alleged by the prosecution.

13. Jivkubhai, father of the unfortunate victim, in paragraph 1 of his deposition exh.23, has stated that he knew the accused No.2 Kirangiri, accused No.4 Rameshgiri, accused No.5 - Ashok and accused No.6 - Viniyo. However, he did not know the accused No.1 very well. He has

stated that, on the day of the incident, since the climate was moist, and it appeared as if it would rain, he had returned from the dyeing factory. According to him, when the climate is moist and it rains, the dyeing work is not done. He had, therefore, returned to his house and then gone out for going to the bazaar. While he was walking on the road which goes towards Sardharpur gate, he saw that his son Hareshbhai was walking ahead of him and at that time, at the corner of the road, near Gigabhai's `deli', the accused No.2 - Kirangiri, the accused No.3 Lalitgiri, the accused No.4 - Rameshgiri and the accused No.5 Ashok attacked his son Hareshbhai. All of them were having knives. The first blow was given by the accused No.3 - Lalitgiri below the arm of Hareshbhai on his side. The accused No.4 - Ramla was having a bigger knife and he had given blow with it on the back of Hareshbhai. The other two accused had also attacked simultaneously. He identified all the accused persons who had attacked his son Hareshbhai with knives. He has said that Bishubhai was also standing at some distance. This witness had stood by the side of the road and seen the incident. He has stated that all the accused persons were having knives and had simultaneously attacked Hareshbhai. Hareshbhai had run to save his life and entered in Gigabhai's house. This witness has then stated that he had seen all the six accused persons who had given blows to Hareshbhai climbing over the rooms and throwing bricks. In his cross-examination, he has stated that after the incident, he had gone into the house from the rear `deli' and had seen that his son Hareshbhai was lying on a cot in Gigabhai's house. When he saw this, he started swooning and was taken to the osri and people started sprinkling water on him and fanning him. After about half an hour, he composed himself and went to the hospital where he was told by his brother in-law that he was not required and that he should go back. He, his wife and daughter, therefore, went home. In his cross-examination, he has stated that he had seen the `zabba' of his son Hareshbhai in the `falia' of Gigabhai's house. He has stated that he had seen his son walking ahead of him when he was about one `Nalva' (about 20 feet) ahead of him. He has stated that he knew the accused No.5 Ashok since about 1.1/2 to 2 years and that Ashok was staying about 50 to 60 feet away from his house, opposite the house of witness Maluma. He has stated that the accused No.6 Vinu was of village Dhank and that he knew the name of this accused on the day of the incident, but did not know his father's name. He also knew the name of the accused No.1 - Kaliyo Koli who was of Dhar area of village Navagadh. He had seen the incident of knife blows being given to Hareshbhai from a

distance of about 40 feet. He had seen Bishubhai and Bhikhubhai standing nearby. According to him, the incident lasted for about 15 to 20 minutes. The deposition of this witness also clearly establishes that all the six accused persons had attacked his son Hareshbhai with knives and had severely injured him and that thereafter, when Hareshbhai entered the house of Gigabhai and the `deli' was closed, all of them had scaled over the house and had thrown bricks from over the house and thereafter ran away towards Sardharpur gate. There was nothing unusual when this person who was working in a dyeing factory had come back from the factory, because, the climate was moist due to rains and in such a climate, no dyeing work could be done in the factory. It often would happen that daily wagers would return when the work is not to be done in the factory. Even Bishubhai had spoken about this aspect of the matter that dyeing work will not be done when climate is moist. This witness, therefore, cannot be described as a chance witness. It was but natural for him to stand by the side of the road when he saw his son being assaulted by six persons with knives. He was 60 years of age and could not be expected to intervene bare handed for trying to save his son and no criticism can be levelled against his conduct of watching the assault and not trying to intervene when six young men were brutally assaulting his son with knives. In such a situation, if he had tried to intervene bare handed at his age of 60 years, it might have resulted in yet another murder on his being killed on the spot in the mood in which all these accused persons were mercilessly inflicting knife blows on Hareshbhai despite his imploring them to leave him. The criticism against this witness that he was wearing the same spectacles since 15 years and therefore, his evidence should be discarded, does not make any sense. In paragraph 7 of his deposition, he did say that he was wearing the same spectacles for 15 years, but people both rustics as well as urbanites are known to be wearing the same pair of spectacles for even longer time, not only in rural areas but also in urban areas. Wearing the same pair of spectacles for 15 years would not justify an inference that a person was not able to see the incident. If the glasses and the frame remains intact, a person may continue to wear the same spectacles for as long as he desires. He has stated that his spectacles were for the distant vision. We are satisfied from the deposition of this witness that he fully corroborates the prosecution version on the aspect of all the six accused persons giving knife blows to his son Hareshbhai on 15-9-1992 in the morning around 9.30 a.m. and that multiple injuries were caused by them to Hareshbhai who entered the house

of Gigabhai, and that these accused persons had even thereafter scaled over the house and pelted objects from the terrace in the `fali' of the house and thereafter, they had run away towards Sardharpur gate. The omissions which have been emphasized in context of the deposition of this witness have hardly any bearing on the material parts of the prosecution story, which stands fully supported by the deposition of this witness.

14. The prosecution witness Inaben who is the daughter of Monghi Maasi was in the house by the side of her mother on the day of the incident as her mother was having chest pain, as stated by her in her deposition. She has stated in her deposition exh.19 that she knew the complainant Geetaben, her mother Kanchanben, Hareshbhai and others. Bhikhubhai and Bishubhai were tenants in her house. On 15-9-1992, Geetaben had come to inquire the health of her mother and at that time, Damuben had accompanied her. Her father had gone out of the house around 8.00 or 8.30 a.m. Samjuben and Induben who were the wives of the two tenants were in their rooms. After sometime, Damuben had gone out of the `deli'. Thereafter, this witness and others had heard Hareshbhai's voice when Hareshbhai was saying, `Lalit leave me, Kiran leave me, Ramesh leave me' and therefore, she, Geetaben and her mother went out of their room. When they saw that Hareshbhai had entered the `deli', her mother closed the `deli' from inside. According to her, Hareshbhai's condition was precarious and he was leaning against the wall while walking. First he had gone towards the room of Samjuben. He had pressed his `zabba' against the wounds on his chest which were bleeding. When Hareshbhai went near the room of Samjuben, Samjuben's children started crying. Hareshbhai thereafter went inside their room. The assailants who were outside were shouting for sending Hareshbhai out and had threatened that, otherwise, they would set their house on fire. They however did not open the `deli'. She has stated that two of them had scaled over the wall, while four others had climbed from the rear over the rooms. She has stated that the accused No.2 Kirangiri and the accused No.3 - Lalitgiri had scaled over the wall, while the remaining four had climbed from the rear. She has stated that she had seen these persons who had climbed over the house. In paragraph 3 of her deposition, she has given the names of all the six accused persons as the persons whom she had so seen. She identified all the accused persons before the court. She has stated that all these accused persons after climbing over the rooms, were throwing bricks in the `fali' of their house. She has stated that Hareshbhai had after

going in their room, fallen on the cot which was lying and at that time, he was saying, `Kiran leave me, Ramesh leave me'. After saying this much, he did not say anything further and became unconscious. She has stated that thereafter the accused persons had gone away, but she does not know how they got down while they were going away. She has given description of the three rooms which were falling in the `fali' of their house. They were on the right side after one entered the `deli' of the house. She has stated that behind her room, there is an `osri' and another `fali' and `deli'. The deposition of this witness clearly shows that Geetaben had come to their house on the day of the incident alongwith Damuben to inquire about the health of her mother Monghiben and that at that time, Damuben had gone out of the `deli' and while she was outside the house, the incident had occurred. Hareshbhai had entered the `deli', profusely bleeding and had pressed his `zabba' on the bleeding wounds. He had gone into the room where the cot was lying and had after falling on that cot, became unconscious. She had heard Hareshbhai raising cries imploring the accused Nos. 2, 3 and 4 to spare him. She has maintained in her cross-examination that she knew the accused No.5 Ashok since about 6 or 7 months prior to the date of incident. She also knew the accused No.1 Koli Kaliya since about an year. She knew Damuben since long time. She has also stated that she had seen the persons who had climbed over their house even before Hareshbhai had entered their house. She has maintained that she had seen the police taking the `zabba' from near the wall. She has stated that Hareshbhai was taken away in an ambulance to the hospital. This witness, who was about 15 years of age when she deposed, was a natural witness in the surroundings where the incident occurred and there is nothing to show that she had any reason to falsely implicate any of the six accused persons whom she had named as the persons who had scaled over their house and pelted bricks in the `fali' when Hareshbhai had entered their house profusely bleeding and pressing his wounds on his chest with his `zabba'. There is no reason to doubt her version that she had seen all these accused persons and that she knew them. She had heard Hareshbhai raising cries and had seen him falling on the cot and then, becoming unconscious. This witness fully supports the prosecution version on the aspect of these six persons scaling over her house and pelting bricks when Hareshbhai had entered the house profusely bleeding and the `deli' was closed from inside and their having thrown bricks in the `fali' of the house. Her deposition also establishes that when Hareshbhai entered the house and the `deli' was closed from inside, they were shouting to send Hareshbhai

out of the house, otherwise they would set the house on fire. After Hareshbhai became unconscious, these accused persons had gone away. This witness clearly establishes the identity of all the accused persons. The omissions which have been brought out in her deposition are hardly of any substance and do not affect her version on the above material particulars of the prosecution case.

15. Prosecution witness Monghiben, who has deposed at exh.25, has stated that she resides in her house named `Chamunda Nivas' with her husband Gigabhai and daughter Inaben. In her house, Bishubhai and Bhikhubhai were the tenants. Samjuben, wife of one of the tenants, had delivered a child on the day prior to the date of her deposition and was not in a position to come, as stated by her. She knew Hareshbhai and his family members. As stated by her in paragraph 1 of her deposition, she had known the accused No.2 Kirangiri who was Sarpanch of the village, the accused No.3 - Lalitgiri, accused No.4 Rameshgiri and the accused No.5 - Ashok. She also knew the accused No.1 - Kalu and accused No.6 Vinu. In her cross-examination, she has maintained that she had known the accused No.1 Kalubhai since more than a month prior to the date of the incident and had known about his name from other women. She had seen the accused No.1 eight to ten times. She has also stated that she had known the accused No.6 Vinubhai for two to four months prior to the incident and that the accused No.6 Viniya used to pass by her `deli'. She had seen the accused No.6 Viniya about ten to fifteen times. She had seen the accused No.5 Ashok five to seven times. She knew that the accused Nos. 2, 3 and 4 were brothers because they were of the same village. According to this witness, she was not well since some days and on the date of the incident, she was resting in her house. In the morning at about 9 o'clock, Geetaben, sister of Hareshbhai had come to inquire about her health. While she, her daughter Inaben and Geetaben were in the house, there was commotion, and Geetaben and Inaben went out while she slowly followed them upto the threshold of the house and at that time, Hareshbhai ran inside their `deli' profusely bleeding. This witness immediately closed the `deli' from inside. Hareshbhai first started going in the room of her tenant Bhikhubhai. As he was not able to walk, he was leaning against the wall. Thereafter, he walked towards her house and fell on the cot. He had at that time twice said, `Kiran leave me, Lalit leave me'. There were knife blows inflicted on Hareshbhai. After she had closed the `deli' from inside, she had heard the shouts that Hareshbhai should be sent out, otherwise they would set fire on her house. She however did not open the `deli'

and therefore, the accused No.3 Lalitgiri and the accused No.4 - `Ramlo' had scaled over the wall and she saw that, in a short while, all the accused had climbed over their rooms and from there, bricks were thrown in the direction of the wall where Hareshbhai was leaning. Six or seven bricks were thrown, but they did not hit Hareshbhai or anyone else. Thereafter, all of them started raising cries. Her deposition clearly establishes that all the six accused who were known to her had assaulted Hareshbhai who had rushed into her house profusely bleeding and when she closed the `deli' from inside, these persons had scaled over the wall and had gone on the top of the room and had started throwing bricks in the falia of her house. The presence of these six accused at the time of offence is clearly established from her evidence. The six accused persons were bent upon finishing off Hareshbhai even after he was gravely injured with multiple knife blows, and that is why, they had climbed over the house and had pelted bricks and only when they perceived that Hareshbhai had become silent, they retreated. There is hardly any reason to disbelieve this witness and she has supported the prosecution version on its above important aspects.

16. Prosecution witness Maluben in her deposition exh.18 has stated that, on the date of the incident, Kanchanben, mother of Hareshbhai had told her to accompany her because Hareshbhai was being beaten by Lalitgiri and Kirangiri. She has stated that while she was going alongwith Kanchanben, she had seen the accused No.2 - Kirangiri, the accused No.3 - Lalitgiri and the accused No.4 - Ramlo Bavaji coming from opposite direction with knives in their hands. She identified all the three accused persons whom she had so seen. When they reached Monghiben's house, she saw that the dead body of Hareshbhai lying on a cot and Geetaben was crying. After sometime, an ambulance came and Hareshbhai was taken to the hospital. In her cross-examination, she has stated that she knew the accused No.5 as he was staying opposite her house, though she did not know his father's name. He was staying in that house since three years prior to the date of the incident. She has stated that the house of Hareshbhai was at a distance where a shout from her house could be heard. She has stated that the house of Gigabhai was at a distance of about two to three minutes walk from her house. She had not witnessed any part of the incident except that while she was proceeding alongwith Kanchanben after getting the information about Hareshbhai being assaulted, she had seen the accused Nos. 2, 3 and 4 coming from the opposite direction with knives in their hands. To this

extent, she supports the prosecution.

17. The version of the aforesaid eye witnesses and other witnesses clearly establishes the complicity of all the six accused persons in the crime. It is clear that they had preplanned the attack, because, when Hareshbhai was passing from the place where the incident occurred, all of them had pounced on him from different directions with open knives and caused as many as eighteen incised wounds on his body, six of which were individually sufficient to cause death in the ordinary course of nature. It was contended that Hareshbhai could not have, in view of such severe injuries, rushed into the house of Gigabhai. This argument is fallacious. If we note the injuries from the medical evidence, there was no injury on the legs of the deceased and therefore, it was quite possible that though he had received as many as eighteen knife blows, he could rush into the house of Gigabhai for shelter.

18. The criticism against some of the witnesses who had not initially given the names of the two of the accused persons on the ground that their version should be discarded because no identification parade was held, is fallacious. There is a difference between persons unknown and persons whose names may not be known. Latter may not necessarily be persons not known to the witnesses though the witness does not know their names. If you know your neighbour by face, but do not know his name, he does not thereby become an unknown person. An unknown person would be a person whose identity is not perceived by the witness either by looks or by name. A person known need not be an acquaintance. We are satisfied that the witnesses who did not name the accused Nos. 5 and 6 initially had already known them by face and were in a position to identify them as persons who were amongst the assailants. Failure to hold an identification parade does not make inadmissible the evidence of identification in court, as held by the Supreme Court in Kanta Prasad v. Delhi Administration, reported in AIR 1958 SC 350. In Jadunath Singh v. The State of U.P., reported in 1970(3) SCC 518, it was held that absence of test identification in all cases is not fatal and if the accused person is well known by sight, it would be waste of time to put him up for identification. In Mehtab Singh v. The State of Madhya Pradesh, reported in (1975) 3 SCC 407, it was held that the need for identification parade arises only if the assailants are not previously known to the witnesses. In Harbajan Singh v. State of Jammu & Kashmir, reported in (1975) 4 SCC 480, it was held that failure to hold identification parade would not be fatal where enough

corroborative and conclusive evidence was present. The evidence of identification is a relevant piece of evidence under section 9 of the Evidence Act at the trial. Identification by the witnesses of an accused is substantive evidence though inherently of a weak character. The evidence of identification in test identification parade is not a substantive evidence but is only corroborative evidence which falls in the realm of investigation. The substantive evidence is the statement of witness made in Court. As held by the Supreme Court in Ronny alias Ronald James Alwaris v. State of Maharashtra, reported in (1998) 3 SCC 625, the purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier, strength or trustworthiness of the evidence of the identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time after a long time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such a piece of evidence. But, if a witness has known an accused earlier in such circumstances which lend assurance to identification by him in court and if there is no inherent improbability or inconsistency, there is no reason why his statement in court about the identification of accused should not be relied upon as any other acceptable but uncorroborated testimony, as held by the Supreme Court in paragraph 18 of the said judgement.

19. If the substantive evidence of a witness before the court is found to be reliable, then absence of corroboration by test identification would not be in any way material. We have found that though the complainant had not given the names of the accused Nos. 5 and 6 while giving the names of the other accused persons in the FIR, the accused Nos. 5 and 6 were already known to her by their sight and merely because she did not know their names and had therefore described them, as `unknown persons' whom she would know by their sight, in the FIR, her evidence cannot be discarded. In fact, in her deposition before the Court, she has stated that the accused No.5 was residing near her locality. It was the suggestion by the defence itself that the accused No.5 was residing just a couple of houses away from her house. Therefore, if she knew these accused persons whom she had not named by their looks, it cannot be said that they were persons not at all known to her. She had identified all the accused persons before the Court and her evidence

appears to be reliable to us. Moreover, she gets supports from the deposition of other eye witnesses who had known all the accused persons and had named them as these six persons, who had inflicted the injuries on Hareshbhai. Mere non-mention of names of accused Nos. 5 and 6 in the FIR would in this case, therefore, not assist any of the accused persons including those two accused persons. There is no rule of law stipulating that the accused whose name is not mentioned in an FIR is entitled to an acquittal. As held by the Supreme Court in Liyakat Mian v. The State of Bihar, reported in (1973) 4 SCC 39, absence of names of accused persons in the FIR is not necessarily fatal. The persons lodging the FIR may not be in such a frame of mind to discuss about the names of the culprits before he leaves for the police station. Non-mention of names of culprits may on the other hand inspire confidence that the informant was not out to implicate his enemies, as observed in paragraph 7 of the judgement.

20. The criticism that the witnesses are chance witnesses is hardly justified. As noted above, Geetaben alongwith Damuben had gone to inquire about the health of Monghi Maasi whose house was at a walking distance of two - three minutes. Monghiben was in the house and her daughter Inaben was naturally by her side, because, Monghiben was unwell. Prosecution witness Induben was also naturally in her house because her husband Bishubhai was a tenant there. As noted above, Bishubhai's returning to his own house from the bazar because no dyeing work was to be done in a moist climate, was also quite natural. Even Jivkubhai came back because the climate was moist and no dyeing work was to be done in the factory. Therefore, none of the witnesses can be described as chance witness. The Supreme Court in Rana Pratap v. State of Haryana, reported in AIR 1983 SC 680 has observed that, "The expression `chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are `chance witnesses', even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence. In the same judgement, the Supreme Court also observed that, every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away

to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter attacking the assailants. Thus, everyone reacts in his own special way. There is no set rule of natural reaction. Therefore, there is no justification in the criticism against Jivkubhai that his conduct was unnatural because as a father he would not just stand by the road when his son was being assaulted by people with knife. To discard the evidence of this witness on the ground that he did not react in any particular manner would be an unrealistic approach to appreciation of his evidence.

20.1 In Raju alias Rajendra v. State of Maharashtra, reported (1998) 1 SCC 169, it was held by the Supreme Court that when incident takes place on a public road, passersby would be the best witness and rejection of their evidence on the ground that they were chance witnesses was not justified.

21. The contention that independent witnesses from the locality were not examined is wholly misconceived. The prosecution witnesses Bishubhai, Induben, Inaben, Monghiben, were all independent witnesses and had no reason to implicate any of these accused persons. Even Geetaben, Jivkubhai and other witnesses cannot be said to be interested witnesses. In State of Bihar v. Ram Pardarath Singh, reported in AIR 1998 SC 2606, the Supreme Court held in paragraph 10 of the judgement that, if independent persons were not willing to tell the police that they had seen the incident, the prosecution cannot be blamed for not examining independent persons as eye witnesses and veracity of the evidence of the witnesses examined as eye witnesses cannot be doubted on that ground. It was contended that there were about 100 people who had gathered after the incident near the house of Gigabhai. There is nothing to show that any of those persons who gathered had witnessed the incident. Therefore, the evidence of several eye witnesses which is recorded in this case cannot brushed aside on an imaginary ground that other people who had gathered there had witnessed the incident and should have been examined. The only specific aspect that was contended in this regard by the learned counsel was that Kanchanben, mother of Hareshbhai was not examined. Kanchanben had not witnessed the incident, because, she was at her house and came to the house of Gigabhai only after she was informed that her son Hareshbhai was assaulted. Therefore, there was no point in examining Kanchanben and no adverse inference can be drawn against the prosecution for not examining her. There is no other specific suggestion

made that any other person had seen the incident and was not examined by the prosecution. In Babu Ram v. State (Delhi Administration), reported in AIR 1998 SC 663, it was held that where the investigation did not disclose presence of other eye witnesses inspite of incident taking place in a broad day light, the prosecution evidence cannot be discarded merely on the ground of non-examination of the independent witnesses.

22. The contention that there is conflict between the medical evidence and other evidence is devoid of any substance. In fact, the medical evidence supports the version of the eye witnesses because it is clearly established that all the eighteen injuries which were caused to the deceased were possible by the sharp cutting instruments which were shown to the medical expert being the muddamal knives and a `gupti'. We have, in detail, discussed the discrepancy of `O' group in the post mortem note and have firmly come to the conclusion that the blood group of the deceased was `B' as per the serologist's report and from several items which were recovered from the dead body of the deceased and sent for analysis. The medical expert's opinion that thirteen of the eighteen injuries were such which would have corresponding cut marks on the `zabba' that was worn by the deceased is amply corroborated from the report of the FSL exh.35 in which it has been stated that after examining the edges of the cut marks of the `zabba' and the edges of the five knives and the `gupti', it appeared that these cut marks were possible by these sharp cutting instruments.

22.1 Importance and primacy is required to be given to the orality of the trial process and where the evidence of eye witness is found credible and trustworthy, medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The evidence of the eye witness in the present case is inherently consistent and their version is inherently probable. We find that the account that they have given is consistent with other evidence and is creditworthy and cannot be set at naught by some minor inconsistency with reference to possibilities suggested to the medical expert.

22.2 In Solanki Chimanbhai Ukabhai v. State of Gujarat, reported in AIR 1983 SC 484, the Supreme Court held that ordinarily the value of medical evidence is only corroborative and it proves that injuries could have been caused in the manner alleged and nothing more. Unless the medical evidence goes so far that it completely rules out all possibilities whatsoever of

injuries taking place in the manner alleged by the eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. The opinion of the doctor as to how an injury was caused cannot overrule unimpeachable testimony of eye witnesses as held by the Supreme Court in Darshan Singh v. State of Haryana, reported in (1996) 10 SCC 283.

23. There is hardly any substance in the contention that the place of occurrence might be different because no blood was found in the open space where Hareshbhai was assaulted by these accused persons. It has come on record that it had drizzled on that day. As per the evidence, the deceased had tried to take shelter by getting into the house of Gigabhai after he was given knife blows by these accused persons. From the medical evidence, it appears that there were no injuries on his legs. It was, therefore, possible for him to get into the house of Gigabhai which was nearest to the place of incident. In the `fali' of Gigabhai's house, Hareshbhai had stood for sometime and there was a pool of blood from which a sample of earth was taken. The bricks which were thrown by the accused persons were also collected and three of them were blood stained and sent for analysis. The `zabba' which bore thirteen cuts and which as per the witnesses was pressed against the wounds by the deceased after he entered the `fali' of Gigabhai's house, was also seized from that place and that blood stained `zabba' was also sent for analysis to the FSL alongwith other articles. All these items were found to be having human blood of group `B' which was the same group which was found on the `lengha' and shoes which were recovered from the body of the deceased when the post mortem was done; the authenticity of which has never been doubted. There is no substance in the contention that Hareshbhai could not have rushed into the house of Gigabhai when six of the eighteen injuries were individually sufficient to cause his instantaneous death. Hareshbhai went to the house of Gigabhai and fell on the cot and became unconscious as per the reliable evidence on record and presumably he died at that time, because on being taken to the hospital, he was declared dead. From the post mortem notes and other evidence, it appears that he was a well-built person and when there were no injuries caused on his legs, in his anxiety to save himself from further blows if he had run a few feet for going into the house of Gigabhai, it cannot be said that the scene of offence was different, because, Hareshbhai ought to have dropped dead where he was given knife blows. Such imagination is not permissible in the face of reliable evidence of the

prosecution witnesses which clearly shows that he did enter the house of Gigabhai and fell on the cot in Monghiben's house where he muttered his last words imploring the assailants to leave him.

24. The evidence of eye witnesses is found by us to be reliable needing no further assurance. However, as noted above, the medical evidence in fact supports the eye witnesses. There is other re-assuring part of the evidence in the nature of discovery of weapons, arrest of the accused Nos. 2, 3 and 4 on 26-9-1992 near village Ganod together with blood stained clothes, chemical analyzers report and serologist's report exh.35 showing that five out of the six weapons were having human blood of group `B', the clothes of the accused No.2, 3, 4 and 5, namely the shirts and pants which were seized at the time when they were arrested, were all found to have been stained with human blood as per the chemical analyzers report. While the human blood on the clothes of the accused No.4 was not sufficient for ascertaining the group, the blood found on the clothes of the accused Nos. 2, 3 and 5 was found to be of group `B' as per the serologist's report. Moreover, the knives and the gupti which were discovered at the instance of the accused Nos. 1, 2, 3, 4 and 5 under the discovery panchnamas were found to be having human blood on their blades, which as per the serologist's report was of group `B' which was the group of the blood of the deceased as per the analysis of the blood which was found on his shoes and `lengha' which were recovered from his dead body and his `zabba' which was also recovered under the panchnama from the `fali' of Gigabhai.

24.1 The discovery of the knife by the accused no.2 Kiringiri was proved in the deposition of panch Bharatbhai at exh.49 and the panchnama is at exh.50. Similarly, the discovery of the knife by the accused No.5 Ashok was proved by the deposition of panch Mukeshbhai exh.51 and the panchnama exh.52. The panchas in both these cases were led towards Sardharnagar gate and the discovery was made near about that place at the instance of these accused persons. The panchnama of the scene of offence exh.62 has been proved in the deposition of panch witness Razakbhai exh.61 who has supported the prosecution version as regards the seizure of various articles from `fali' of the house of Gigabhai and as regards the scene of the occurrence. The blood marks on the walls in the `fali' of Gigabhai, pools of blood on the ground, the blood stained `zabba' which had thirteen cuts being found from the `fali', bricks being found from that `fali' of which three were blood stained, are all

re-assuring aspects of the matter, which support the eye witnesses. It was noted under this panchnama that when it was made, the ground was wet due to rains. Therefore, if outside the `fali' on the public road no blood marks were found or collected, no adverse inference can be drawn especially when blood soaked earth was collected from the ground in the `fali'. It was in the `fali' that the bleeding Hareshbhai stood for longer after he entered the `deli' and obviously it would be easier to collect the blood from the pool of blood which was on the ground in the `fali' as it had not been washed away from that spot when the panchnama exh.61 was drawn at 2.00 p.m. on that very day. The panchnamas exh.68, 73, 74 and 75 under which discovery of weapons was done at the instance of the accused No.1 - Kaliya, the accused No.4 Ramesh, the accused No.3 - Lalit and the accused No.6 - Vinu, were proved in the deposition of the investigating officer, because, the panchas did not support the prosecution though they have all admitted their signatures in the panchnama and in the packets in which the weapons were sealed. The arrest panchnama of the accused Nos. 2, 3, 4 and 5 is at exh.69 and under that panchnama, their clothes were also seized on 26-9-1992 near village Ganod where they were arrested together when detected by the police.

24.2 It was submitted that since the panch witnesses have turned hostile, the Court cannot rely on the evidence of discovery. This submission is erroneous, because, as held by the Supreme Court in Modan Singh v. State of Rajasthan, reported in AIR 1978 SC 1511, if the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version. In a recent decision of the Supreme Court in State, Government of NCT of Delhi v. Sunil, reported in (2001) 1 SCC 652, while considering the provisions of section 27 of the Evidence Act, and section 114 Ill.(e) thereof, the Supreme Court has held that there is no requirement either under section 27 of the Evidence Act or under section 161 of the Criminal Procedure Code to obtain signature of independent witnesses on the record in which statement of an accused is written. The obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and

to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. It was held that it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused, the document prepared by the investigating officer contemporaneous with such recovery must necessarily be arrested by the independent witnesses. It was held that if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The Court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth. The Court observed that, it is an archaic notion that actions of the police officer should be approached with initial distrust and that it is not a legally approvable procedure to presume the police action as unreliable to start with, and to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions. It was held that when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused, it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. In the present case also, we find that the version given by the police officer about the discovery of the weapons at the instance of the accused persons is reliable and re-assures the evidence of the prosecution witnesses who have deposed as to the participation of the accused persons in the crime. Even without these discovery panchnamas, as noted by us hereinabove, there is reliable evidence to connect all these accused with the crime, and, their evidence is sufficient to hold that these accused persons had formed an unlawful assembly and with a view to achieve their common object of intentionally causing death of deceased Hareshbhai they had on 15-9-1992 around 9.30 in the morning, attacked him with knives and a gupti and caused eighteen incised wounds which resulted in his death.

24.3 While going through the evidence, one small discrepancy came to our notice and was discussed with the learned counsel and that was regarding noting down the length of the `gupti' which was recovered at the instance of accused No.4. Though this slight discrepancy has hardly any bearing on the involvement of all the accused

persons, we note that in the panchnama of the recovery of `gupti', it was mentioned that the `gupti' had bent due to blow. One does not know in what manner the measurement of the blade was taken and no one's attention was directed to this during the trial. At the place where the length of the blade is mentioned, the word `approximate' is used. Therefore, we are not inclined to attach any importance to this slight discrepancy. The fact that the human blood was found at the edge of `gupti' is amply established and there is absolutely no reason to suspect that the weapon was changed. In any event, as noted above, even in absence of any discovery panchnama, we are satisfied that the guilt of all the accused has been established beyond any reasonable doubt by the prosecution.

25. The fact that even after giving multiple blows with sharp cutting weapons, when Hareshbhai had gone into the `deli' and the door of the `deli' was closed, all these accused persons had climbed over the house and were throwing bricks in the `fali', clearly shows that they all intended to put an end to the life of Hareshbhai and when after the last words were muttered and silence ensued, they were satisfied about having attained their object and thereafter, they receded together. There cannot be a more cruel demonstration of the object of killing a person than the one all these persons had, as is evident from their conduct.

26. In view of what we have said hereinabove, we fully endorse the reasoning and the findings of the learned trial Judge and dismiss all these appeals.

JULY 20, 2001 [R.K.ABICHANDANI, J.]

[SHARAD D. DAVE, J.]

parmar*